

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ITV DIRECT, INC.,

Plaintiff,

v.

HEALTHY SOLUTIONS, LLC, et al.,

Defendants.

CIVIL ACTION NO. 04-CV-10421-JLT

RELATED CASES

AFFIDAVIT OF ROBERT MAIHOS

I, ROBERT MAIHOS, declare as follows:

1. I am a principal shareholder of defendant ITV Direct, Inc. ("ITV"), and am responsible for the day-to-day operations of ITV. I make this affidavit on the basis of my own personal knowledge of the facts set forth herein and could testify competently thereto if called to do so.

2. On April 4, 2003, ITV entered into an exclusive "Distribution Agreement" with a California limited liability corporation, Healthy Solutions, LLC, for the manufacture and distribution of a product known as "Supreme Greens with MSM". A copy of that Distribution Agreement is attached hereto as Exhibit A. The Distribution Agreement is governed by Massachusetts law. The Distribution Agreement provided that ITV would produce an infomercial for Supreme Greens with MSM featuring Healthy Solutions' founder and principal shareholder Alejandro Guerrero. The Agreement provided that ITV would be the exclusive distributor of the product in connection with the infomercial.

3. In the infomercial and in other media, Guerrero states that he is a doctor and operates a clinic in California. He states that he has cancer patients, AIDS patients, and patients

with MS, diabetes and Parkinson's disease. He states that through his clinic he conducted a study of over 200 of patients, all of whom were diagnosed as terminally ill, and that all but eight of these patients are still alive. In addition, Guerrero has represented on numerous occasions prior to and during the production of the infomercials that he received a doctorate degree in Traditional Chinese Medicine from the Samra University in California. See Exhibit B.¹ For example, in a taping session that occurred on April 11, 2003, Guerrero unequivocally stated "I [] received my doctorate in traditional Chinese medicine." Similarly, in promotional materials, Guerrero is represented to be an OMD (doctor of oriental medicine) in California. See Exhibit C.² On several occasions, Guerrero confirmed to me and other officers of ITV that he possessed documentary and clinical support for these representations. I also understand that an officer of Healthy Solutions, Gregory Geremesz, has submitted a sworn declaration to the Court stating that Guerrero is an OMD.

4. Between April 4, 2003 and February 6, 2004, ITV issued purchase orders to Healthy Solutions for the purchase of the Supreme Greens with MSM product in varying quantities.

5. In order to promote the sale of Supreme Greens, ITV expended millions of dollars on advertising for the product, primarily in connection with the production and airing of two separate infomercials featuring Guerrero. ITV also developed the logo and labels for Supreme Greens with MSM, and with the encouragement and approval of Healthy Solutions filed an application for federal registration of the name of the product. Contrary to plaintiffs' assertions, that trademark application has not been finally refused, but is still pending.

6. In late 2003, ITV learned that Healthy Solutions had filed a competing trademark application for federal registration of the name "Supreme Greens with MSM," in violation of the

¹ Attached as Exhibit B are true and accurate copies of web pages featuring Guerrero and discussing his credentials that I obtained through a simple Internet search.

² Attached as Exhibit C are true and accurate copies of web pages featuring Guerrero and discussing his credentials that I obtained through a simple Internet search.

parties' agreement that the trademark would belong to ITV. In early 2004, the parties orally modified the prior Distribution Agreement to include sales of Supreme Greens with MSM over the Internet, transfer ownership of the website address www.supremegreens.com, and the withdrawal of Healthy Solutions' competing trademark application. In connection with this agreement, ITV expended well in excess of a million dollars on additional marketing and advertising for the product, which it has yet to recoup from sales of the product. In addition, on January 9, 2004 ITV forwarded a check in an additional amount of \$7,500 to confirm Healthy Solution's agreement to transfer ownership of the website. Healthy Solutions has cashed this check, confirming the agreement. A copy of this letter and the check is attached as Exhibit D.

7. In February 2004, ITV learned that, despite the modified agreement, payment for the website and ITV's continued expenditures on marketing and advertising, Healthy Solutions had failed to provide an accounting of Internet sales to ITV and had failed to withdraw its trademark application as promised, causing substantial injury to ITV. With regard to Internet sales, I reviewed a recent listing in the leading direct response industry magazine, "Response", which listed Internet searches for Supreme Greens as the fourteenth most popular search for February 2004, with over 55,000 searches. Based upon this data, ITV believes that Healthy Solutions' Internet sales are substantial and possibly equal or exceed the amounts Healthy Solutions claims is owed by ITV. However, without an accounting for these sales, ITV has no measure of the exact amount. Healthy Solutions has also sought to establish relationships with other distributors and media production companies, despite the exclusivity provision in the Distribution Agreement.

8. In connection with the production of the infomercials for Supreme Greens with MSM, Guerrero made numerous controversial claims regarding the health benefits of Supreme Greens with MSM. In support of these claims, Guerrero represented that he had conducted clinical trials in his medical practice and additional studies. Both prior to and after the production of the infomercials, Guerrero represented to me and others at ITV that he had

competent and reliable scientific evidence for each and every claim that he made in the infomercials, including reports of studies, clinical results and similar documentation.

9. In the Distribution Agreement, Healthy Solutions agreed to indemnify and hold harmless ITV and its officers, directors, employees, shareholders and affiliates from any and all claims, lawsuits, actions and proceedings in court or by any governmental unit, relating to the manufacture and content of Supreme Greens with MSM, and health claims made by Guerrero concerning the claimed impact the product would have on the health of users of the product.

10. Within the last two weeks, ITV has been contacted by both the United States Food and Drug Administration and the Federal Trade Commission concerning the health claims that Guerrero has made in connection with the Supreme Greens with MSM product, both in the product labeling and packaging provided by Guerrero and Healthy Solutions and in the infomercials. Each agency has indicated that they do not believe Healthy Solutions or Guerrero can provide competent and reliable scientific evidence to support the claims made by Guerrero in connection with Supreme Greens with MSM. I understand that the remedies that each agency could seek against ITV in connection with these investigations could shut down the business and put hundreds of employees out of work, and could include damages in the amount of the Product's gross sales revenue. The gross sales revenue of Supreme Greens with MSM substantially exceeds the approximately 1.8 million dollars that Healthy Solutions and Guerrero claims they are owed by ITV for breach of the Distribution Agreement.

11. In addition, in connection with the FDA and FTC investigations, ITV has investigated the background of Guerrero, who has represented to ITV, the public and the Court that he is a doctor and an OMD. Neither claim appears to be true. Rather, it appears that Guerrero received only a Masters Degree from Samra University in Los Angeles, and has never received a doctorate of any kind at any time. Thus, it appears that Guerrero lied to ITV and defrauded ITV in connection with his true background, in clear breach of the representations and warranties in the Distribution Agreement.

12. On April 23, 2004, I watched on ABC News a segment of its news program “20/20” regarding Supreme Greens with MSM, in which Guerrero was interviewed. During that interview, Guerrero stated for the first time that he had no written documentation to support his clinical studies or the health claims he has made regarding Supreme Greens with MSM.

13. Based on the defendants’ fraudulent representations to ITV, their indemnification obligations under the Distribution Agreement, their failure to account to ITV for Internet sales, among other breaches of contract, ITV has refused to pay Healthy Solutions under the Distribution Agreement, and filed this action against Healthy Solutions, Guerrero, and others.

14. I understand from a review of the plaintiffs’ motion for a temporary restraining order that the plaintiffs claim that ITV has produced, or is well into the process of producing, a nutritional supplement bearing the mark “Supreme Greens” that was manufactured by an entity other than Healthy Solutions. That claim is false. ITV has never manufactured, bottled or sold any product under the label “Supreme Greens with MSM” that was not manufactured and delivered by Healthy Solutions or one of its subcontractors. I am aware of no “fake,” “phony,” or “counterfeit” products whatsoever currently in the marketplace, and ITV has neither produced nor sold any such product.

15. In addition, ITV has not produced any labels bearing the name “Supreme Greens with MSM,” and does not intend to produce labels bearing the name “Supreme Greens with MSM” pending resolution of the issue of the ownership of that trademark.

16. In his original declaration dated April 6, 2004 and submitted to the federal court in California, Guerrero stated that he had a conversation with me on or about March 24, 2004 in which I told him that ITV had received approximately 50,000 bottles of product from an unidentified manufacturer. This alleged conversation never occurred, and I never spoke to Guerrero on that date. I was in Florida on March 24, 2004, and, since approximately mid-March 2004, all direct conversations between Guerrero and I have ceased. Instead, discussions regarding possibly resolving our disputes were being conducted by an impartial third-party intermediary, Todd Stanwood. The alleged statement that Guerrero asserted that I made is

utterly false, as ITV has never received any bottles of any Supreme Greens product other than from Healthy Solutions.

17. In his “amended” declaration dated April 8, 2004 and the current declaration submitted to this Court, Guerrero omits any reference to a conversation between him and me on March 24, 2004, and now states that he had a conversation with Mr. Stanwood on that date. Although Mr. Stanwood was authorized to act as a neutral intermediary, I at no time authorized him to make the representations contained in paragraph 8 of Guerrero’s amended declaration regarding the ordering of 50,000 bottles of an “imposter” product bearing the Supreme Greens label. Moreover, I would not have authorized Mr. Stanwood to make such representations because ITV did not order 50,000 bottles of an “imposter” of the Supreme Greens product, let alone 50,000 bottles of such product bearing the Supreme Greens mark. I understand that Mr. Stanwood denies making the statements attributed to him in the amended Guerrero declaration.

18. In his amended declaration, Guerrero also states in paragraph 8 that “on or about March 29, 2994 [sic] Defendant again asserted it had ordered 50,000 bottles of the phony product.” I never spoke to Guerrero on or about March 29, 2004, nor did I authorize anybody to make this representation to him. I again understand that Mr. Stanwood denies making any such statement to Guerrero.

19. ITV has contacted a manufacturer with which it has an existing relationship regarding the possible production of a greens product other than Supreme Greens, but no product has been manufactured. All that has occurred is that certain raw materials have been ordered by the manufacturer for possible production of ITV’s own greens product, a product that ITV is, of course, fully entitled to sell. No product has been bottled, no product has been labeled, and no product has been sold. Nor is the sale of any greens product imminent, as ITV has no agreement with any manufacturer to produce such a product and no current plans to authorize such production. If any such product is produced for marketing, it will not be sold under the “Supreme Greens with MSM” mark unless and until the issue of the ownership of that mark is

resolved in favor of ITV through the declaration of ITV's ownership that ITV has sought in its complaint in the Massachusetts action and would seek in this Court.

20. In light of the FTC investigation of the claims made by Guerrero and our current belief that his representations about being a doctor are false and fraudulent, ITV has cancelled all future media purchases in connection with the Supreme Greens infomercial featuring Dr. Guerrero, and is actively substituting other infomercials for media time that ITV has already purchased, at substantial expense. ITV has no intention to air the Supreme Greens infomercial in the future, and intends to sell off existing inventory through reorders and its autoship program. The autoship program is a contract with our customers to deliver them product in the future at regular intervals.

21. Finally, although I understand that plaintiffs have not alleged any claims for violation of any claimed trade secrets in their complaint, I understand that both Guerrero and Geremesz contend that the formula for the Supreme Greens product delivered to ITV is a trade secret and insinuate that ITV is using or will use that alleged trade secret. As plaintiffs admit in their memorandum of points and authorities, however, ITV has never been given access to any "secret formula." The root ingredients in plaintiffs' product are prominently displayed on the bottles they manufacture and deliver.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of April, 2004 at Beverly, Massachusetts.

/s/ Robert Maihos
ROBERT MAIHOS